

(1977) 05 CAL CK 0023

Calcutta High Court

Case No: Civil Rule No. 2736 of 1976

Saroj Kumar Dey

APPELLANT

Vs

Sunil Kumar Dey

RESPONDENT

Date of Decision: May 31, 1977**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 10, 115, 151

Citation: (1977) 2 ILR (Cal) 179**Hon'ble Judges:** N.C. Mukherji, J; B.C. Ray, J**Bench:** Division Bench**Advocate:** Mukul Prosad Banerjee and Sanat Kumar Sil, for the Appellant; Kanan Kumar Ghosh, N. Chowdhury and Dilip Kumar Seth, for the Respondent

Judgement

B.C. Ray, J.

This is an application u/s 115 of the CPC and it is directed against Order No. 24 dated June 24, 1976, passed by the Judge, Third Bench, City Civil Court at Calcutta, in T.S. No. 565 of 1975, allowing the Plaintiff's application for analogous hearing of T.S. No. 565 of 1975 with T.S. No. 326 of 1975 and rejecting the application of the Defendant for stay of the subsequent suit u/s 10 of the Code of Civil Procedure.

2. The Petitioners and the opposite parties are all the sons and daughters of Monmohan Dey, since deceased. The Petitioners as Plaintiffs instituted T.S. No. 326 of 1975 in the City Civil Court at Calcutta against the opposite parties for a declaration that the deed of gift executed by their father on March 6, 1972, was void and invalid and for cancellation of the same. There was also a prayer for a further declaration that the Petitioners as heirs have 2/11th share in the said property which comprises of residential house at premises No. 52/B Kailash Bose Street, Calcutta-6 and for permanent injunction against the Defendants. In the said suit the Defendants' opposite parties Nos. 1 to 3 appeared and filed written statement contending, inter alia, that the deed of gift was not void and invalid, but the same

was a valid document executed out of love and affection by their father in favour of the Defendants opposite parties Nos. 1 to 3. The opposite parties Nos. 1 to 3 subsequently instituted T.S. No. 565 of 1975 in the City Civil Court at Calcutta against the Petitioners as well as the opposite parties Nos. 4 to 9 for declaration of their title on the basis of the said deed of gift for recovery of possession and permanent injunction and damages. The Petitioners who are Defendants in this suit entered appearance and filed a written statement. The defence of the Petitioners, inter alia, is that the deed of gift is a void and invalid document and as such, the Plaintiffs were not entitled to get the declaration asked for by them.

3. On May 24, 1976, the Petitioners filed an application u/s 10 of the CPC in T.S. No. 565 of 1975 for staying the suit till the disposal of T.S. No. 326 of 1975 on the ground that the matters in issue in the above suit is also directly and substantially issue in T.S. No. 326 of 1975 which is a previous-suit instituted between the same parties and both the suits are pending before same Court. On May 31, 1976, the opposite parties Nos. 1 to 3 also filed an application in T.S. No. 565 of 1975 u/s 151 of the CPC praying for analogous hearing of T.S. No. 326 of 1975 and T.S. No. 565 of 1975 on the ground that the subject-matter in issue as well as the parties are directly and substantially the same in both the suits. On June 26, 1976, the Judge, Third Bench, City Civil Court at Calcutta, after hearing the parties passed Order No. 24 and held that the issues raised in both the suits between the same parties are almost same. It has been, further, held that the mandatory provisions of Section 10 of the CPC though intended to bar a separate trial of suit in which the matter in issue is directly and substantially in issue in a previous instituted suit between the same parties, yet this bar does not apply to the simultaneous hearing of the latter suit and earlier suit after consolidation of the two suits. Section 10, Code of Civil Procedure, is never intended to take away the inherent power of the Court to consolidate suits for ends of justice. The learned Judge, therefore, allowed the prayer for stay u/s 10, Code of Civil Procedure.

4. It is against this order this Rule was obtained and an order of an interim stay of operation of the impugned order as well as of stay of all further proceedings in T.S. No. 326 of 1975 was made.

5. Mr. Mukul Prokash Banerjee, learned Advocate appearing on behalf of the Petitioners, has submitted that the subject-matter of both the suits is substantially the same inasmuch as the central issue requires to be decided as whether the deed of gift executed by the father of the Petitioners and the opposite parties Nos. 1 to 3 is a void and invalid document or not. Mr. Banerjee has further submitted that the decision on this point in the earlier suit being T.S. No. 326 of 1975 will automatically operate as res judicata in the latter suit being T.S. No. 565 of 1975. As such, the main test of applying the provisions of Section 10 of the CPC is satisfied. The intent and purport of this section is to avoid conflicting judgments on the same matter in issue and also it applies to cases where the decision on the matter in issue in the earlier

suit will operate as res judicata to the matter in issue in the subsequent suit. Mr. Banerjee further submits that this provision creates a bar to jurisdiction upon the civil Court to proceed with the trial of the latter suit if the conditions mentioned in Section 10 of the CPC are satisfied. According to Mr. Banerjee, it is not only a mere matter of procedure but is a matter dealing with the jurisdiction of the Court and as such, provisions of this section are mandatory. The Court below acted in excess of its jurisdiction in holding that this bar cannot stand in the way of the Court exercising its inherent power to consolidate the suit for the ends of justice.

6. Mr. Kanan Kumar Ghosh, learned Advocate for the opposite parties, on the other hand, joined issue and he has contended that Section 10 of the CPC no doubt creates a bar upon the civil Court to decide the subsequent suit if the matters in issue in the subsequent suit are substantially the same in the earlier suit between the same parties. Mr. Ghosh submits that this bar in no way prevents the Court from exercising its inherent power u/s 151 of the CPC to consolidate both the suits and to pass an order for analogous trial of both the suits in the interest of justice. In support of his submission Mr. Ghosh has mentioned certain decisions. Mr. Ghosh also submits that the said two suits are not substantially the same inasmuch as the reliefs claimed in both the suits are not identical and as such, Section 10 of the CPC is not applicable in this case. Mr. Ghosh, therefore, submits that the impugned order is neither illegal nor the same has been made in excess of jurisdiction of the Court and as such, this revisional application is liable to be rejected.

7. It appears from the statements in para. 5 of the petition that the Petitioner stated in the application u/s 10 of the CPC filed in T.S. No. 565 of 1975" that the matter in issue in that suit is also directly and substantially in issue in T.S. No. 326 of 1975 which has been instituted previously by the Petitioners. In para. 7 of the affidavit-in-opposition filed on behalf of the opposite parties Nos. 1 to 3 and sworn by the opposite party No. 1 Sunil Kumar Dey on November 26, 1976, it has been stated that the opposite parties Nos. 1 to 3 reiterate their statements in Clauses A to K in para. 4 of the said affidavit. In para. 4(i) it has been stated that an application u/s 115 of the CPC was filed by the opposite parties Nos. 1, 2 and 3 for hearing of both the suits together or analogously on the ground that, both the suits were between the same parties and the issues framed in both the suits were identical although the reliefs claimed by the parties were, somewhat different. Thus, it is the admitted position that the matter in issue in both the suits are substantially the same and both the suits are between the same parties and are pending in the Third Bench, City Civil Court, Calcutta. The conditions envisaged in Section 10 are, therefore, satisfied. The next question that requires decision is whether in such a case the Court can exercise its inherent power u/s 151 of the CPC to allow the application for analogous hearing of both the suits and to reject the application for stay of the subsequent suit being T.S. No. 565 of 1975 for the ends of justice. To decide this question it will have to be decided whether the provisions of Section 10, Code of Civil Procedure, creates a bar on the civil Court to proceed with the trial of

the latter suit before the decision of the earlier suit. It is also necessary to consider in this connection whether the provisions of this section will apply if the reliefs claimed in both the suits are different though the subject-matter of the controversy between the parties in both the suits are substantially the same.

8. In [Jai Hind Iron Mart Vs. Tulsiram Bhagwandas](#), it has been held that Section 10 does not contemplate an identity in issue between the two suits nor does it require that the matter in issue in the two suits should be entirely the same or identical. Section 10 requires the matter in issue in the two suits should be directly and substantially the same. But the identity and the field of controversy contemplated need not be identical and same in every particular, but the identity and field of controversy must be substantially the same. It has been further observed that an order passed u/s 10 is not an order dealing with procedure. It is an order dealing with the jurisdiction of the Court, because u/s 10 whatever order is passed affects the jurisdiction of the Court. It is a mandatory provision and the suit cannot go on if it is stayed and therefore, the decision u/s 10 must affect the jurisdiction of the Court one way or the other. Every decision dealing with the jurisdiction of the Court is a decision affecting the rights of the parties.

9. In a Bench decision of this Court in [Shorab Merwanji Modi and Another Vs. Mansata Film Distributors and Another](#), it has been held that an order passed by the Court staying the subsequent suit u/s 10 affects the jurisdiction of the Court to try the suit although the bar created may be temporary. An order refusing a stay also involves assumption of jurisdiction and in so far as it negatives the Defendant's contention that the suit cannot be proceeded with and upholds the Plaintiff's claim that the suit must proceed and thus it affects the merits of a part of the controversy between the parties, the controversy being a controversy in the suit as to where the subject-matter should be tried. It has also been held that the fact that one suit is a suit under the agreement and the other suit is a suit de hors the agreement does not make a substantial identity of the subject-matter per se impossible if the basis of defence in one suit and the basis of claim in another suit appear to be same and if the defence succeeds, nothing will be left out in the other suit. It is to be taken that the matters in issue in both the suits are directly and substantially the same. Complete identity of either, the subject-matter or the parties is not required.

10. In a Bench decision of this Court in [Arun General Industries Ltd. Vs. Rishabh Manufacturers Private Ltd. and Others](#), it has been observed that the matter for determination in a case for application for stay u/s 10 of the CPC is not what the basis of the claim in the two suits is the matter in issue in the two suits. The claim in a suit may very well be a claim based on a contract, but the contract may be sought to be repudiated by the Defendants on the ground of a tort mainly fraudulent misrepresentation, which in its turn may be the basis of a claim of a second suit. The two different bases of claim, namely, one based on a contract and the other on a tort, would not make the matters in issue in the two different merely on the ground.

If a claim based on a contract on one suit is sought to be avoided and repealed on the ground of fraudulent misrepresentation and a subsequent suit is filed claiming on the basis of a fraudulent representation with regard to the same contract the issues nevertheless in the two suits would be substantially the same, even though the basis of the claim in the two suits are altogether different. Their Lordships in making the above observations followed the decisions in *Jai Hind Iron Mart's case Supra* and *Shorab Merwanji Modi's case Supra*.

11. In the [Life Pharmaceuticals \(Private\) Ltd. Vs. Bengal Medical Hall](#), it has been held by R.M. Datta J. that the test to be applied in deciding an application u/s 10 of the CPC is whether the matter in latter suit will be res judicata if the prior suit is taken to have been decreed in the manner as prayed in the plaint. An application u/s 10 is maintainable at any stage of the proceeding as soon as the conditions laid down in Section 10 are satisfied and the Court is bound to stay its hands and will cease to have jurisdiction to proceed with the subsequent suit any longer. The language of the section is mandatory and as such, no option is left to the Court to refuse an application on the ground of delay or laches.

12. In [Harbans Lal Arora Vs. Divisional Supdt. Central Railway, Jhansi and Others](#), it has been held by Dhavan J. that Section 10 does not go to the root of the jurisdiction of the Court trying the second suit, but merely lays down a rule of procedure. If a rule can be waived for one good reason it may be waived also for another good reason in the interest of justice. The provisions of Section 10 do not destroy the jurisdiction of the trial Court and can be waived in appropriate cases. This section does not prevent the parties from invoking the inherent power of the Court to consolidate suits in appropriate cases; the Court itself exercises this power suo motu and directs consolidation in the interest of justice.

13. In [Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal](#), it has been observed by their Lordships of the Supreme Court:

The provisions of Section 10 are clear, definite and mandatory. A Court in which a subsequent suit has been filed is prohibited from proceeding with the trial of the suit in certain specified circumstances. When there is a special provision in the CPC for dealing with the contingencies of two such suits being instituted, recourse to the inherent powers u/s 151 is not justified. The provisions of Section 10 do not become inapplicable on a Court holding that the previously instituted suit is a vexatious suit or has been instituted in violation of the onus of the contract.

14. On a conspectus of the above decisions and particularly in view of the pronouncement made by the Supreme Court, it is now well-settled that the provisions of Section 10 are mandatory and this section creates a bar of jurisdiction on the civil Court to proceed with the trial of the subsequent suit if the conditions specified in Section 10, Code of Civil Procedure, are satisfied. In such case, it is, incumbent on the Court to pass an order for stay of the subsequent suit under the

provisions of this section. In the instant case, we have already held that the matters in issue and the field of controversy between the parties are substantially the same in both the suits as admitted by them. Of course, all the reliefs claimed in both the suits are not identical. The parties in both the suits are the same and the suits are pending in the same Court. This being the position it is incumbent on the Court to stay the hearing of T.S. No. 565 of 1975 till the decision of T.S. No. 326 of 1975. We therefore, hold that the learned Judge has acted illegally and in excess of his jurisdiction in allowing the application for analogous hearing and rejecting the application for stay u/s 10 of the Code of Civil Procedure. We also held that in view of this specific provision of Section 10 of the CPC the learned Judge acted illegally and in excess of its jurisdiction in exercising his inherent power u/s 151 in passing the impugned order for analogous hearing of both the suits.

15. For the reasons aforesaid the contentions raised on behalf of the Petitioners succeed and the Rule is made absolute.

16. There will, however, be no order as to costs in the circumstances of the case. Let the records go down to the Court below immediately.

N.C. Mukherji, J.

17. I agree.